



Waivers for Covered Telecommunications and Video Surveillance Services or Equipment under FAR 4.2104

A Mandatory Reference for ADS Chapter 302

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I. OVERVIEW

[ADS Chapter 302, section 302.3.6.14, FAR Part 4.2101 Prohibition On Covered Telecommunications And Video Surveillance Services and Equipment](#) provides policy and procedures for addressing offers and awards where the offeror/contractor has represented that it uses covered products/services prohibited by FAR 4.21. This mandatory reference supplements ADS Chapter 302 policy and procedures and provides agency procedures for waiver approvals as authorized by FAR 4.2104.

All waivers must be approved by the Deputy Administrator.

II. BACKGROUND:

FAR 4.21 implements section 889(a)(1)(B) of the [National Defense Authorization Act \(NDAA\) for FY 2019 \(Pub. L. 115-232\)](#) that prohibits agencies from entering into, extending, or renewing contracts with any entity that uses equipment, systems, or services that use telecommunications equipment or services from certain named companies as a substantial or essential component or critical technology as part of any system, on or after August 13, 2020.

Until [FAR 52.204-26 Covered Telecommunications Equipment or Services-Representation](#) is revised to reflect the annual representation for this prohibition, offerors/contractors must indicate whether they use the covered products/services in the representation at [FAR 52.204-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment](#). Per [FAR 4.2104](#), the head of the agency may grant a one-time waiver to the FAR 4.2102(a) prohibition on a case-by-case basis for up to a two-year period not to extend beyond August 13, 2022. Also, see [ADS 302.3.6.14.b.\(3\)](#) for statutory waiver authority for the Director of National Intelligence.

Contracts with [FAR clause 52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment](#) require the contractor to report discovery of covered products/services in their systems or supply chain immediately to the Contracting Officer (CO).

III. GUIDANCE:

A. Waiver Procedures

(1) New Awards

If an offeror(s) represents at FAR 52.204-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment paragraph (d)(2) that it “does” use covered telecommunications equipment or services as described in that provision, it is considered a request for a waiver. The offeror(s) is required to provide disclosure information with its offer as described in paragraph (e)(2) of FAR

52.204-24. The competitive process will proceed as usual; however, an award to any of those offeror(s) must not be made unless a waiver has been approved. In situations where all offerors indicate they use covered telecommunications equipment/services, COs must not award the contract unless a waiver is granted. The CO may rely on the representations of all offerors unless the CO has reason to question the representations, e.g., where the other offerors do not affirmatively indicate their use of internet services in a particular country that are already known by the CO to contain the covered components. In this case, the CO will consult with the Office of General Counsel (GC/A&A) and the Bureau for Management, Office of the Chief Information Officer (M/CIO) by emailing **section889waiver@usaid.gov**.

During the solicitation process, if the offeror(s) requesting the waiver is the apparently successful offeror, the CO must notify the Planner/requiring office of the offeror's representation and the need for a waiver in order to make an award to that offeror. The CO will forward the offeror's disclosure information to M/CIO at:

section889waiver@usaid.gov, with a copy to the Planner/requiring office. M/CIO will determine whether any existing waiver is applicable and advise the CO.

Note: It is possible that the offeror's/contractor's waiver request may identify use of covered technology in both the offeror's systems and in an external service-provider's system. If a waiver request is entirely covered by an existing approved waiver, the CO must document M/CIO's determination and that the waiver request does not require further review/approval. The CO may proceed to award (see step 8 below).

If the waiver request is not entirely covered by an existing waiver as determined by M/CIO, the CO will advise the Planner/requiring office. The CO, in consultation with the Planner/requiring office, must decide whether to initiate the formal agency waiver process based on market research and feedback from government contractors during the acquisition process, in concert with other internal factors. Given the significant information and associated timeframe to obtain such a waiver, the agency may reasonably choose not to initiate a waiver and to move forward and make the award to an offeror that does not require a waiver where agency needs do not permit time to obtain a waiver.

All offices must mark emails and documents submitted as part of the waiver request package as "Source Selection Sensitive" and handle them accordingly. All offeror information marked as "Proprietary" must also be handled appropriately.

If no waiver request will be processed, the requiring office must advise the CO of the decision, and request that the procurement move forward without further consideration of that offeror(s).

If the requiring office determines that an Agency level waiver will be pursued, the following procedures must be followed for processing the waiver request:

1. The CO must request the offeror to submit the supporting information required under the provision [Waivers under FAR Part 4.21 Prohibition On Covered Telecommunications And Video Surveillance Services and Equipment](#) in Section L of the solicitation.
2. Once the additional information is submitted by the offeror, the CO will provide the submission to the requiring office.
3. The requiring office, in accordance with Mission/Bureau/Independent Office (M/B/IO) procedures, must prepare this [waiver request package](#) within five business days after receipt of the offeror's information from the CO and submit it to M/CIO for review, with a copy to the CO. The request must include an action memorandum that:
 - a) Articulates a compelling mission critical need for the agency to consider the waiver, to include the impact on the agency/program if the waiver is not approved, the lack of viable alternatives for equipment/systems/services that are not covered technologies (if any) as presented by the offeror,
 - b) Includes/states an assessment that the level of risk of successful performance by alternate offeror(s) with negative representations is unacceptable;
 - c) Includes a list of the FAR 52.204-24 representations by all offerors;
 - d) Includes disclosure information provided by the offeror as required at 52.204-2(e); and
 - e) Includes the Section L offeror submission.

In the case of an emergency acquisition waiver request, see section C below for additional requirements.

4. **Initial M/CIO review:** M/CIO will acknowledge receipt and conduct an initial review of the package. Within five business days, M/CIO will identify omissions, if any, in the offeror's information disclosures. If M/CIO requires any omitted information or clarifications, M/CIO will coordinate the request for information through the CO.

If M/CIO considers that the waiver request meets the following requirements, M/CIO will clear the waiver package to the next stage of M/CIO review, specifically:

- a. Sufficiently meets the regulatory requirements for a waiver;

- b. Sufficiently meets the statutory requirements for a waiver, and include a compelling justification from the offeror for the additional time to implement the requirements, a full and complete laydown, and a phase out plan;
- c. Establishes the lack of viable alternatives for equipment/systems/services that are not covered technologies (if any) as presented by the offeror; and
- d. Does not otherwise present an unacceptable level of cybersecurity risk to USAID.

If M/CIO declines to advance the waiver request, M/CIO will document the reason and return the waiver request to the requiring office for coordination with the CO (see steps 7 and 9 below).

ODNI Consultation: Unless emergency acquisition procedures apply (see Section B.), M/CIO must “notify and consult with the Office of the Director of National Intelligence (ODNI) on the issue of the specific waiver request using ODNI briefings, best practices, or direct inquiry, as appropriate” before advancing the package (see [FAR 4.2104](#)).

- If ODNI advises USAID of existing information suggesting that the waiver would present a material increase in risk to U.S. national security, M/CIO will document the ODNI consultation in the waiver request accordingly, and advise the requiring office of the results of the consultation with a recommendation. The requiring office must notify the CO accordingly.
 - If ODNI advises USAID it has no existing information suggesting that the waiver would present a material increase in risk to U.S. national security, then M/CIO must document the consultation and response from ODNI in the waiver request package, incorporate M/CIO’s recommendation, and forward the waiver package to the requiring office for next steps in the approval process.
5. The requiring office must submit the waiver request package to the Office of the Assistant Administrator, M Bureau (AA/M) for tracking, and coordination with the Deputy Administrator. The AA/M will forward the waiver request package to the Deputy Administrator for the tentative approval and attestation required by FAR 4.2104.
 6. The Deputy Administrator will review the package for approval:
 - a. If the waiver is not approved, the Deputy Administrator will notify the AA/M. AA/M will notify the requiring office who will inform the CO and M/CIO of the disapproval of the waiver.

- b. If the waiver is TENTATIVELY approved for sending notification to ODNI/ Federal Acquisition Security Council (FASC), the Deputy Administrator will sign the attestation and the AA/M must immediately notify the FASC and ODNI of USAID's intent to approve the waiver and include with the notification any other information that ODNI/FASC requires.

No sooner than 15 days after the notifications, the Deputy Administrator may approve the waiver request; the AA/M will forward the approved waiver request package to LPA and the requiring office. The requiring office must inform the CO, with a copy to M/CIO.

LPA must notify the appropriate congressional committees as required in Section C below.

In the case of an emergency acquisition, notifications to ODNI and FASC may be completed 30 days after award (see section B below for the expedited approval process).

7. The requiring office must provide the CO with the approved/disapproved waiver so that the CO may proceed accordingly with the procurement. The CO must file the entire waiver package (approved or denied) in the contract file in ASIST before proceeding.
8. If a waiver for the offer is approved, the CO must incorporate a special contract requirement in Section H in any resulting contract/task order that: 1) requires the contractor to confirm completion of the actions in the Phase Out Plan; and 2) reserves the right of USAID to require further review of relevant information to ensure that all planned Phase Out actions were completed. As part of contract administration, the COR must monitor the contractor's compliance with the phase out plan and inform the CO and M/CIO of any concerns as necessary at **Section889waiver@usaid.gov**.
9. If a waiver is not approved, the CO will proceed with evaluation and award of the remaining offers and notify the offeror in accordance with FAR 15.506. However, if there are no other responsive and responsible offers, or all offerors request a waiver for use of the covered products/services and fail to receive an approved waiver, the CO must advise the requiring office that the solicitation will be cancelled.

(2) Indefinite Delivery/Indefinite Quantity (IDIQ) Task Orders (TOs)

The CO and the requiring office must follow the same procedures when issuing TOs where an IDIQ-awardee represents at FAR 52.204-24 paragraph (d)(2) that it uses covered telecommunications equipment or services. In the case of a single award IDIQ, if an exception does not apply and a waiver is not approved, the CO must not award the TO. In the case of fair opportunity procedures under a multiple award IDIQ, the CO

must proceed with award from the remaining pool of IDIQ holders. To initiate the waiver request process, Task Order Contracting Officers (TOCOs) must request the additional information specified in the Requests for Task Order Proposal (RFTOP) (see [ADS 302.3.6.14 b.\(1\)\(iv\)](#)) and follow the procedures in (A)(1) of this guidance. Once a waiver is awarded at the IDIQ level, there may not be a need to obtain waivers at the TO level if the contractor confirms that the TO representation does not include additional covered technology beyond what was identified and approved in the existing waiver.

(3) Existing Awards - Extensions to the Period of Performance

In advance of the exercise of options or modifications to extend the period of performance, the CO must advise the contractor that the new clause FAR 52.204-25 will be incorporated into the award and request verification that the contractor does not use the covered equipment/services. Until FAR 52.204-26 Covered Telecommunications Equipment or Services-Representation is revised to reflect the annual representation for this prohibition, the CO must require the contractor to submit the representation at FAR 52.204-24. If the contractor's representation indicates that the contractor uses the covered equipment/services and no exception applies, the CO must not proceed with the extension modification or exercise the option, unless a waiver is approved. The same procedures for waiver requests discussed in Section A(1) above apply.

B. Expedited Waiver Process for Emergency Acquisitions

FAR 4.2104(a)(3) provides for waivers in emergency acquisitions:

“In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical functions or emergency response and recovery.”

Requiring offices may use this authority only when disasters have been declared in accordance with Agency policy.

For emergency acquisitions, the requiring office must include in the waiver request package a compelling justification for use of the emergency acquisition waiver process. The waiver package must also include a determination that the notice and consultation requirements are impracticable due to the specific emergency condition, consistent with the FAR requirement that the emergency acquisition only be used when prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions.

Within 30 days of award, the **AA/M** must notify the ODNI and the FASC of the waiver issued under emergency conditions.

C. Congressional Reporting and Tracking of Waivers

- a. No later than five days after approval, the **AA/M** will provide a copy of each approved waiver to LPA for submission to Congress as required by FAR 4.1204(a)(2):

“The head of the executive agency shall, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committees—

- (1) An attestation by the agency that granting of the waiver would not, to the agency’s knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security; and
- (2) The required full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain; and
- (3) The required phase-out plan to eliminate covered telecommunications or video surveillance equipment or services from the entity’s systems.”

The laydown described above must include a description of each category of covered telecommunications or video surveillance equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after such an inquiry.

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